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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5521

CLARENCE EUGENE STRUNK,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER


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## OPINION BELOW

No opinion was rendered by the United States District Court for the Eastern District of Illinois. The opinion of the United States Court of Appeals for the Seventh Circuit (App. 16) is reported at 467 F.2d 969.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1972. Timely motion for rehearing was filed, and it was denied on September 7, 1972. The petition for writ of certiorari was filed on October 5, 1972, and certiorari was granted on January 8, 1973. This Court has jurisdiction under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

Whether a court, in reviewing a cause after trial, conviction, and sentence, and finding expressly that a defendant has been denied a speedy trial to his prejudice,

a. is required, under the principles of the Sixth Amendment to the Constitution of the United States, to discharge absolutely from his sentence a defendant so denied; or,

b. is required, under the principles of the Sixth Amendment to the Constitution of the United States, to reverse the conviction, vacate the sentence, and dismiss the indictment of a defendant so denied; or,

c. may engage a remedy, consistent with the principles of the Sixth Amendment to the Constitution of the United States, by which a defendant so denied is credited with the period of unreasonable delay, attributed to the prosecution, which originally gave rise to his denial of a speedy trial.

## CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

## STATEMENT

On May 26, 1970, the Petitioner was indicted on a count charging violation of 18 U.S.C. 2312, that is, the interstate transportation of a stolen motor vehicle with the knowledge that the motor vehicle was stolen (R. 1). At the time, the Petitioner was serving a sentence of one to three years in the Nebraska State Penitentiary on an unrelated charge (App. 14).

On January 26, 1971, a notice of arraignment and a writ of habeas corpus ad prosequendum were issued by the district court (R. 3). It appears that the Petitioner was not notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendum (App. 20).

The Petitioner was arraigned on February 9, 1971, and he entered a plea of not guilty (Tr. Arraignment, 3). Trial was set for March 29, 1971.

On February 19, 1971, the Petitioner filed a motion to dismiss the indictment on the ground that he had been denied a speedy trial (App. 1). The motion was heard on March 18, 1971, and it was denied.

Trial by jury was had on March 29, 1971, and the Petitioner was found guilty as charged (R. 18).

On May 4, 1971, the Petitioner was sentenced to the custody of the Attorney General for a period of five years, the sentence imposed to run concurrently with the sentence then being served by the Petitioner in the Nebraska State Penitentiary.*

*The Document was marked in a court below as "21," and the aforesaid marking appears on the upper right hand corner of the document.

Appeal was taken and the Court of Appeals found that the Petitioner had been denied a speedy trial (App. 21). The Court of Appeals further found that the Petitioner did not claim to have been prejudiced in his defense (App. 21). The Court of Appeals remanded the case to the district court with direction to enter an order instructing the Attorney General to credit the Petitioner with the period of time elapsing between the return of his indictment and the date of his arraignment (App. 22).

An order, pursuant to the direction on remand, was entered by the district court on August 29, 1972 (App. 23).

Timely motion for rehearing was filed, and the motion was denied on September 7, 1972 (R. 00).

Petition for writ of certiorari was filed on October 5, 1972, and certiorari was granted on January 8, 1973 (App. 24).

## SUMMARY OF ARGUMENT

When the Court of Appeals reviewed the Petitioner's claim of denial of a speedy trial, it was reviewing the district court's denial of Petitioner's motion to dismiss his indictment. In applying a remedy upon finding that the Petitioner had been so denied, the Court of Appeals could not take into consideration the irrelevant facts of Petitioner's trial and guilt.

The remedy applied by the Court of Appeals cannot stand for it presumes the validity of Petitioner's trial, and that presumption is in contradiction of the court's finding of a violation of Petitioner's right to a speedy trial.

Petitioner, having been found to have been denied his right to a speedy trial, should be absolutely discharged from his sentence. While this remedy is admittedly severe,

it is the only remedy that effectively enforces the right to a speedy trial. The remedy is practical, for, while it maximally protects the individual's right, it does not demean societal interests in the right to a speedy trial.

## ARGUMENT

### I.

**THE FINDING OF A DENIAL OF A SPEEDY TRIAL IS A JUDICIAL ASSERTION THAT THE PETITIONER MAY NOT BE PUT TO TRIAL ON THE CHARGE AGAINST HIM. THE PETITIONER, HAVING BEEN FOUND TO HAVE BEEN DENIED HIS RIGHT TO A SPEEDY TRIAL, SHOULD BE ABSOLUTELY DISCHARGED FROM HIS SENTENCE, FOR THE REMEDY OF ABSOLUTE DISCHARGE IS THE ONLY REMEDY THAT EFFECTIVELY PROTECTS THE INDIVIDUAL'S RIGHT TO A SPEEDY TRIAL.**

#### a. The Positional Perspective of a Reviewing Court Is Limited to the Perspective of the Court Whose Ruling Is Under Review.

In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court enunciated the balancing test to be used by the lower courts in making the determination of whether an accused has been denied his right to a speedy trial. The factors to be weighed in the test are flexible factors, and the test "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis." *Id.*, at 530.

The Court of Appeals below applied the balancing test and concluded that the Petitioner had been denied a speedy trial. The Petitioner submits that the finding means exactly what it says, and the effect of that finding should be that the Petitioner should not have been put to trial.

The issue of denial of a speedy trial is crystallized by a motion to dismiss the charge against an accused on the ground of denial of speedy trial. It is at that precise point in time that the facts to be weighed in the balancing test are sealed. It is for this reason that a retrospective fact analysis must be applied in determining the issue.

A district court, in finding a denial of a speedy trial under the balancing test, necessarily will have to conclude:

1. that the length of the delay complained of was relatively long in light of the nature of the crime charged;
2. that the delay was not attributable to the accused, but was attributable to the Government, and the Government could offer no acceptable reason for the delay;
3. that the accused had properly asserted his right and had not waived it; and,
4. that the accused was prejudiced in some form of recognized speedy trial prejudice.

Furthermore, a district court will have to keep in mind that the accused, pursuant to an entered plea of not guilty, is presumed innocent until proven guilty by due process of law.

When a Court of Appeals reviews a district court's denial of an accused's motion for dismissal of indictment for want of a speedy trial, the Court of Appeals must assume a positional perspective identical to that of the district court. It is, like the district court, bound to a retrospective fact analysis in making its determination. In applying the balancing test, the Court of Appeals must weigh the same facts that were available to the district

court.[1] It is only in this manner that a Court of Appeals can say that a district court was right or wrong in denying a motion to dismiss. At the same time, a Court of Appeals is bound to accept, for purposes of determining error in the denial of the motion, that the accused was presumed innocent at the time of his motion, that is, at the time he claimed he was constitutionally wronged.

**b. Absolute Discharge Is the Only Effective Remedy To Protect the Individual's Right to a Speedy Trial.**

Upon a finding of denial of speedy trial, a court can engage only one of three possible remedies—dismissal of the indictment without prejudice, dismissal of the indictment with prejudice, or absolute discharge.

A dismissal without prejudice is a meaningless remedy when a denial of speedy trial has been found. Following such a dismissal, the Government would be free to reindict the accused on the same charge. Reindictment on the same charge would simply permit the Government to do indirectly what it could not do directly. Under a circumstance of immediate reindictment, if the new indictment were attacked by means of a motion to dismiss for want of a speedy trial, such a motion could properly be denied under the balancing test because of a failure to show unreasonable delay.

A dismissal with prejudice is an incomplete remedy for denial of a speedy trial. Such a dismissal apparently would permit the Government to indict the accused on

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[1] If facts to weigh are lacking, a Court of Appeals will remand for further developments below. However, the Court of Appeals herein felt that it had sufficient data upon which to make a determination on the question of denial of speedy trial (App. 18).

an offense which should have been joined with the offense charged in the original indictment. The Government again could do indirectly what it could not do directly, and this would frustrate the guarantee of a right to a speedy trial, issues of fairness aside.

The third possible remedy for denial of the right is absolute discharge. It is the only effective remedy to protect the right of an individual. The American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Speedy Trial* (Approved Draft, 1968), Section 4.1, at page 40, recommends absolute discharge as the remedy to be applied upon a finding of denial of the right. The remedy is effective because it implements the full force of a guarantee. Absolute discharge does not suffer the disabilities of dismissals with or without prejudice, for the remedy not only bars the charge in the indictment but all other charges required to be joined to that charge.

The dictum in *Mann v. United States*, 304 F.2d 394 (C.A. D.C., 1962), covered the subject of remedy. The court therein stated:

> We accept appellant's premise that the constitutional right to a speedy trial is properly enforced by a dismissal of the charge when there has been prejudicial delay in bring (sic) the case to trial.[4] * * * We also agree that a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense. While there appears to be no express articulation of the rule in the reported decisions, it is the unspoken premise of all cases involving the Speedy Trial Clause.[6] *Id.*, at 396-397 (footnotes and cited cases omitted).

The *Mann* court deemed this a necessary rule, and it pointed out that the rule had to be implemented "if the

constitutional guarantee is not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands." *Id.*, at 397. Absolute discharge perfects the rule in that it precludes reindictment on a charge incorporated in the original charge.

**c. The Court of Appeals Below, Having Lost Sight of Its Positional Perspective, Applied a Remedy Which the District Court Could Not Have Applied.**

The sole issue raised by the Petitioner in the Court of Appeals was whether he had been denied his right to a speedy trial. As the Court of Appeals put it: "The defendant contends that when all the circumstances are considered he was not offered a speedy trial and that the district judge erred in not dismissing the indictment." (App. 18). Given that issue, we must consider the positional perspective of the Court of Appeals with that issue before it.

Petitioner submits that the Court of Appeals, in reviewing the district court's denial of his motion to dismiss for want of a speedy trial, sat in the same position—no better, no worse—as the district court when the district court examined the merits of the motion. Like the district court, the Court of Appeals was bound to a retrospective fact analysis in determining whether the district court had erred in denying the motion. Acting in that capacity, the Court of Appeals found a denial of a speedy trial. Having so found, the effect was that the Court of Appeals reversed the district court's denial of the motion, for the conclusions of the respective courts were opposite.

Keeping in mind that the district court could have made the same finding as the Court of Appeals, Petitioner submits that the one thing that the district court could not have done was order the Petitioner to trial after finding that he had been denied a speedy trial. However, that is, in effect, what the Court of Appeals did.

**d. The Speedy Trial Clause Guarantees Equally Against all Forms of Recognized Speedy Trial Prejudice.**

The Court enunciated its recognition of the forms of prejudice that can exist within a speedy trial context in *United States v. Ewell*, 383 U.S. 116 (1966), where the Court stated:

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. *Id.*, at 120.

While the Petitioner was not prejudiced in his defense, his cause did not fail, for the Court has stated that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Marion*, 404 U.S. 307, 320 (1971).

The Petitioner suffered that specific form of prejudice which can attach to an accused who, at the time of his indictment, is already a prisoner under sentence on an unrelated charge. The Petitioner suffered from undue and oppressive incarceration prior to trial, as that form of prejudice applies to prisoner-accuseds,[2] and as it was

[2]This same form of prejudice was the crucial factor in finding a denial of a speedy trial in *United States v. Rucker*, 464 F.2d 823 (C.A. D.C., 1972).

recognized in *Smith v. Hooey*, 393 U.S. 374 (1969), where the Court observed:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial on the pending charge is postponed.[7] *Id.*, at 378 (footnote omitted).

At the time of his federal indictment, the Petitioner had already served approximately six and one-half months of a one to three year sentence imposed in Nebraska on an unrelated charge. It is not difficult to imagine his anxiety with the passing of each day as he awaited trial on the federal charge against him. For as each day passed, another day of possible concurrent time seemed lost. An added travesty was noted by the Court of Appeals in that the Petitioner was not notified of the indictment prior to the issuance of the writ of habeas corpus ad prosequendum. (App. 20) That writ was issued fourteen days before the Petitioner's arraignment.

**e. The Facts of an Accused's Trial and Guilt Are Irrelevant Facts in the Process of Determining the Remedy To Be Applied Upon a Finding of Denial of a Speedy Trial.**

In view of the finding of the Court of Appeals, there can be no doubt that the district court's denial of Petitioner's motion to dismiss the indictment was erroneous. Despite the finding of error, the Court of Appeals

did not absolutely discharge the Petitioner, but, instead, it engaged a remedy that is an anomaly in speedy trial cases. The remedy applied reflected the court's confusion with respect to its positional perspective.

While the Court of Appeals found that Petitioner had been denied a speedy trial, it faced three other facts—the Petitioner had been tried, was not prejudiced in his defense, and was found guilty by a jury. Petitioner submits that, had the court remembered its positional perspective and kept in mind that it had made its finding by retrospective fact analysis, it was obliged to ignore the irrelevant facts of trial and guilt.

The finding of a denial of a speedy trial was unique for the Court of Appeals, for it was the first time in its history that it had so found. There was no line of earlier appellate cases in the Seventh Circuit to which the court could turn for guidance. So the Court of Appeals attempted to do what was fair. And fair was the remedy it applied, but only at first blush.

While the Court of Appeals recognized that the traditional remedy was to dismiss the indictment or vacate the sentence, the Court of Appeals stated:

> . . . we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. (App. 21).

And so the court decided that the proper remedy was to give back to the Petitioner what the Government, by its unreasonable delay in bringing him to trial, had taken away—259 days. The remedy was clearly compensatory, but, just as clearly, it was wrong.

The Court of Appeals overlooked the fact that it was reviewing the district court's denial of Petitioner's motion to dismiss the indictment for want of a speedy trial, which motion had been properly placed before the district court after the Petitioner had entered a plea of not guilty. The Court of Appeals sat as the district court, confronted by an accused who was presumed innocent until proven guilty according to due process of law. This was the positional perspective that the Court of Appeals was obliged to take in reviewing a pre-trial ruling of a court below it.

The remedy applied by the Court of Appeals is astonishing when we keep in mind the positional perspective of the court, for, if the remedy it applied is correct, the district court could have applied the same remedy with equal correctness in the first instance. But this will not pass the test of reason, for the remedy says, in effect, that the Petitioner, a man presumed innocent at the time of his motion to dismiss, has been found to have been denied his right to a speedy trial, and, while his indictment should be dismissed by traditional standards, he must stand trial notwithstanding because of the likelihood of his guilt. The remedy ignores the fact that the right it found violated is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). It also ignores the presumption of innocence. Thus, while seemingly fair, the price of the remedy is too great.

**f. A Compensatory Remedy Indirectly Encourages Government Delay and, If Permitted To Stand, Will Qualitatively Lessen the Speedy Trial Rights of Prisoner-Accuseds.**

An examination of the practical implications of the remedy applied below, to the extent that it permits a prisoner-defendant to be credited with the amount of unreasonable Government delay in bringing him to trial, reveals that the Government is not really charged with the duty of bringing a prisoner-accused to trial promptly. The remedy is too forgiving of carelessness, sloth, and negligence on the part of Government prosecutors. No accusation of sloth is being made herein. There seems little doubt that Government prosecutors labor under numerically heavy case loads. There are too few prosecutors and too few judges. This is society's failure of not furnishing adequate facilities and manpower to accomplish the effective administration of criminal justice.

Facing the prospect of prosecuting an accused who is already incarcerated on an unrelated charge and reasonably recognizing that such an accused may be losing the possibility of serving his sentences concurrently, the Government prosecutor has no imperative need to furnish such an accused with a speedy trial. The duty of diligence is replaced by work-load convenience, for a court will be able to credit the accused with the period of unreasonable delay in bringing him to trial after the accused's presumption of likelihood of guilt has been confirmed by a verdict of guilty.

Since prisoner-accuseds, pursuant to the remedy applied below, can eventually be made whole, it does not stretch the imagination or the ordinary evaluation of human nature to realize that Government prosecutors will give the lowest priority to the cases of prisoner-accuseds.

## II.

## ABSOLUTE DISCHARGE, WHILE EFFECTIVELY PROTECTING THE INDIVIDUAL'S RIGHT TO A SPEEDY TRIAL, SERVES THE ADDED PURPOSE OF PROTECTING SOCIETAL INTERESTS IN THE RIGHT TO A SPEEDY TRIAL.

### a. The Right to a Speedy Trial Is a Fundamental Right and Has Been so Recognized by This Court

The Supreme Court has directly addressed itself to the myriad issues that arise in speedy trial contexts only eight times prior hereto. *Beavers v. Haubert*, 198 U.S. 77 (1905); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Ewell*, 383 U.S. 116 (1966); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969); *Dickey v. Florida*, 398 U.S. 30 (1970); *United States v. Marion*, 404 U.S. 307 (1971); and, *Barker v. Wingo*, 407 U.S. 514 (1972). Nevertheless, the Court has recognized and pronounced the right to a speedy trial to be "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223.

In the *Klopfer* decision, the Court traced the historical basis and American acceptance and development of the right. In concluding its examination of the history of the right, the Court stated:

> The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution. *Id.*, at 226.

This Court has never deviated from its characterization of this right as being fundamental or basic, and its consistency in this respect is reflected in cases which

followed the *Klopfer* decision. Reference is so made in *Smith v. Hooey*, 393 U.S. 374, 375; *Dickey v. Florida*, 398 U.S. 30, 37; and, *Barker v. Wingo*, 407 U.S. 514, 515.

**b. This Court, in Earlier Decisions, Has Indirectly Recognized Absolute Discharge as the Remedy for Denial of the Right.**

Implicit in the Court's recognition of this fundamental right is the expectation that the remedy to be applied for a violation of the right will be of a quality commensurate with the right. While the Supreme Court has never specifically addressed itself to the issue of remedy for denial of the right, we can examine the decisions of the Court where it applied a remedy upon a finding of a denial of the right and where the Court has made comment on the subject of remedy.

While the decision in *Barker v. Wingo*, 407 U.S. 514, did not go to, or turn on, an issue of remedy, the Court, in reviewing the general nature of the right, pointed out:

> The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for new trial,[16] but it is the only possible remedy. *Id.*, at 522 (footnote omitted).

In *Dickey v. Florida*, 398 U.S. 30, the Court reviewed the conviction of a defendant who claimed a denial of a speedy trial. The Court found that the defendant had been so denied, and, in applying a remedy, the Court reversed and remanded "with direction to vacate the

judgment appealed from and direct the dismissal of any proceeding arising out of the charges on which that judgment was based." *Id.*, at 38.

The *Dickey* decision represents the last case in which the Court found a denial of a speedy trial. While the Court did not explicitly so state, the remedy applied by the Court was, in effect, absolute discharge.

**c. Recognizing That Society Has an Interest in an Accused's Right to a Speedy Trial, the Interest of Society Can Only Be Effectively Protected by Applying the Remedy of Absolute Discharge When a Violation of the Right Has Been Judicially Determined.**

While the right to a speedy trial is usually thought of as an individual right, the right serves a broader function in that it "does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 87. As the Court pointed out in *Dickey v. Florida*, 398 U.S. 30:

> The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. *Id.*, at 37.

Petitioner submits that the need for prompt exposition of charges is not an absolute necessity from every accused's point of view, but it is imperative for society in every case in which society brings charges against an accused.

While it is recognized that a defendant may be prejudiced in his defense because of delay in bringing him to trial, it should also be recognized that delay may also serve to prejudice the Government's case. If delay by the prosecution is encouraged, or at least condoned, by an ineffective remedy given to defendants denied speedy trials, then society stands to suffer most. As the Court observed:

> Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate, and time lessens the vigor of officials charged with the duty of prosecution. *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922).

When delay is prolonged, an accused, who is under no obligation to offer a defense at trial, can simply observe the development of weakness in the Government's case and take an acquittal because the Government could not make out at a late date what might have been a strong case at an earlier time.

If prosecutors are aware that the severe remedy of absolute discharge will be applied in the event of a finding of a denial of speedy trial, that awareness alone will have the salutory effect of encouraging prosecutors to tolerate as little delay as possible in preparing and presenting their cases. Prompt trials will serve to eliminate serious claims of denial of speedy trials. Further, prompt trials will insure that the Government will be presenting its best case in each instance, with available and willing witnesses who will be possessed of accurate memories. The interests of society will thereby be best protected and not at the expense of compromising the individual's right.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be reversed with the direction that the Petitioner be absolutely discharged.

Respectfully submitted,

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